Against International Criminal Tribunals: Reconciling the Global Justice Norm with Local Agency[1]

Peter J. Verovšek, Ph.D.[2]
Department of Politics
University of Sheffield
Elmfield, Northumberland Road
Sheffield, S10 2TU
United Kingdom
p.j.verovske@sheffield.ac.uk

ABSTRACT Understood as the need to address state crimes committed under the previous regime, a global norm of transitional justice has emerged since the end of the Cold War. Combined with the postwar resurgence of international law and institutions, this has resulted the increasing use of international criminal tribunals to prosecute state-sponsored human rights violations. I argue that such tribunals are inadequate vehicles for justice because they are divorced from the affected communities and conceive of historical justice too narrowly in legal terms. Building on the discursive cosmopolitanism of Jürgen Habermas and Seyla Benhabib, I contend that respecting local traditions and desires is crucial to achieving justice in local communities. I lay the groundwork for a contextual universalism that respects international legal norms while stimulating discourse in the community where they occurred, so that victims and perpetrators can once again live together as members of the same polity.

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[2] Peter J. Verovšek is Lecturer (Assistant Professor) of Politics/International Relations at the University of Sheffield. His book manuscript, *The European Rupture: A Critical Theory of Memory and Integration in the Wake of Total War*, develops a narrative theory of remembrance as a resource for political change and analyzes the role that collective memories of Europe's age of total war played in the origins and development of the European Union. His work on twentieth century continental political thought, critical theory, collective memory and European politics has been published in *Perspectives on Politics*, *The Review of Politics*, *Political Studies*, *Memory Studies*, *Constellations*, *The European Legacy*, *Millennium*, and the *Journal of Cold War Studies*.

Introduction

The increasing ability of external forces to impinge on the internal affairs of formally independent political communities is a profound challenge to the traditional understanding of states as autonomous sovereign entities. This loss of steering capacity is visible across a variety of issues, ranging from fiscal policy, where the International Monetary Fund increasingly dictates policy to debtors, to migration and climate change, which highlight the porous nature of national borders. Mark Mazower (2012, p. 421) points out that this 'multifaceted erosion of sovereignty is a momentous change' in world politics.

Among its other consequences, the 'hollowing out' (Tooze 2014, p. 5) of sovereignty has transformed international law from a lofty ideal into an enforceable reality (Kelsen 1944, p. 35). This shift is particularly visible in international criminal law. Most obviously, the doctrine of sovereign immunity, which protected state officials from prosecution, has increasingly become a historical artifact. The trials of Serbian President Slobodan Milošević and Rwandan Prime Minister Jean Kambanda by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) testify to a remarkable 'revolution in accountability' (Sriram 2003, pp. 310-429). They reflect the emergence of a 'global justice norm' (Lamont 2011, p. 477) that makes state representatives liable for international crimes.

Although domestic courts have also prosecuted some leaders, much of the literature on the 'justice cascade' (Sikkink 2011, p. 342) focuses on international tribunals. For legal scholars, 'The spread of international criminal justice is indeed one of the few major achievements of the world community' (Cassese 2011, p. 272). This enthusiasm is shared by many political scientists, who argue that this mandate 'should be given to the UN,

preferably through the creation of a permanent International Criminal Court' (ICC) (Mendlovitz and Fousek 1996, p. 142). Political theorists have also welcomed international tribunals as a means for reducing the arbitrary protection sovereignty has historically offered to war criminals (De Greiff 1998; Beitz 1991). Proponents of a strong cosmopolitanism have therefore made the ICC a key component of their call for global democratic governance (Kuper 2004; Held 2002).

Over the last few decades the justifications for war crimes trials have become increasingly results-based (Vinjamuri 2010, pp. 198-201). However, the empirical evidence for international tribunals is mixed, regardless of how success is measured. On one hand, Tricia Olson, Leigh Payne, and Andrew Reitner (2010, p. 210) argue that international tribunals have negative effect on democracy and human rights, especially when used in isolation. On the other hand, Hunjoon Kim and Kathryn Sikkink (2010) have found that prosecutions have a positive influence on human rights conduct, which increases even further if these trials are accompanied by truth commissions. Most of the time, therefore, judgments regarding the success of international tribunals must be made individually for each specific case.

I welcome the development of international criminal law insofar as it encourages the development of a Kantian 'global domestic policy' (*Weltinnenpolitik*). However, I am wary of the growing embrace of international criminal tribunals because they are divorced from the local context in which the atrocities occurred and deny the agency of the communities in question. Additionally, hese high-profile trials often replace or hijack local efforts at societal reconciliation, making international prosecutions into the sole mechanism of historical justice. As such, they become as much about historical truth and

memory as they are about legal justice. This relation was made explicit in the case of the ICTY, which argued that although the court was 'incapable of rendering justice here,' it could at least ensure that 'the truth could be uttered in front of the judges and the victims, recognized as such, in front of the world' (in Hazan 2000, p. 134).

Although this is a noble goal, Martti Koskenniemi notes that truth and memory are not 'something that can be authoritatively fixed by a legal process' (2002, p. 34). Hannah Arendt (2006, p. 251) argues that making international criminal tribunals into mechanisms of truth and memory is a mistake, since 'the purpose of the trial is to render justice, and nothing else.' However, as Karl Jaspers (in 1992, p. 410) notes in a letter to Arendt, such trials are completely inadequate even in terms of justice, since the accused 'stand outside the pale of what is comprehensible.' He argues, 'Something other than the law is at stake here – and to address it in legal terms is a mistake.'

I do not go as far as Jaspers in seeing international criminal prosecutions as a mistake *tout court*. On the contrary, I argue that such trials are an important part of historical justice, but *only* a part. My basic thesis is that international norms against impunity should be implemented domestically, taking local attitudes, mechanisms and traditions into account. Openness to the domestic level and to the fact that prosecution is not necessarily the be all end all of historical justice will help both the international and the local communities to break out of the bifurcation 'between impunity and show trials' (Koskenniemi 2002).

In contrast to the one-size-fits-all blueprint of international criminal tribunals, I propose a more flexible approach to the duties and obligations generated by the emerging global justice norm. Building on the discursive cosmopolitanism of Jürgen Habermas and

Seyla Benhabib, I hold that historical justice should aim to repair the ability of citizens to recognize their mutual humanity, allowing them to live together in a shared polity. Following José Alvarez (1999, p. 469), I argue that historical justice should seek 'to provoke socially desirable, if contentious, conversations in the hope that through honest discourse the guilty will eventually come to recognize that brutal killings are not morally ambiguous.' In fulfilling the goal of social reconciliation, these deliberations may result in support for prosecutions in international criminal tribunals. However, they may also end up endorsing other mechanisms, such as Truth and Reconciliation Commissions (TRCs), truth-telling initiatives and individual bans from public life on the European model of lustration (Rožič and Nisnevič 2016).

My critique of international criminal tribunals is not based on a normative account of the difficulties involved in holding individuals to account for past crimes. Instead, as a critical theorist I start by identifying the problems that exist in contemporary social practices. Following the 'impure' (Williams 2006, p. 155) theoretical approach developed by the Frankfurt School, the first part of my argument examines the empirical pathologies revealed by the activities of the ICTY and ICTR. This 'critical diagnosis of the times' (*Zeitdiagnose*) (Honneth 2004), shows how the physical, administrative, legal and emotional distance of the ICTY and the ICTR from local communities inhibited their ability to serve as effective vehicles of historical justice. Although the creation of the ICC as a permanent tribunal has ameliorated some of the problems I identify in my 'explanatory-diagnostic' (Benhabib 1986, p. 226) analysis, many of these issues persist.

I build my argument on an *internal* or *immanent* understanding of the goals that international criminal law has set for itself. Following Max Pensky (2008, p. 2), I

understand the development of international tribunals as signaling ‘not just the establishment of a new class of international crimes but [of] a legal and political norm against impunity.’ This norm does not necessarily require the prosecution of such crimes – whether domestically or internationally – but instead signals that amnesties ‘are to be understood as incompatible with international criminal law.’ Although it requires that action be taken against the perpetrators of international crimes – how exactly these crimes are defined lies outside the scope of my argument (Renzo 2012) – in practice it serves as an anti-impunity or anti-amnesty norm.

After identifying the ‘systemic dysfunctions and antinomies’ (Márkus 1980b, p. 12) involved in this internationalist approach to transitional justice, I seek to identify ‘critical-practical’ (1980a, p. 81) solutions that meet ‘the needs and demands expressed by social actors in the present’ (Benhabib 1986, p. 226). In part two I introduce the discourse theories of Habermas and Benhabib in order to develop a culturally sensitive framework for mediating between the international duty to hold the individuals responsible to account for their crimes and the needs of the local community. I argue that this contextual universalism can help to resolve the empirical pathologies of existing approaches to international criminal law.

The third section then proceeds to examine how these theoretical insights can be integrated into historical justice through a historical learning process. While other approaches to historical justice might also fulfill the requirements of the anti-amnesty norm, I focus on how national trials and international prosecutions conducted in the local context, such as the postwar trials in Nuremberg and Tokyo, are often able to more effectively promote the cross-party dialogue necessary for social reconciliation within the

local community where the injustices occurred. Finally, the conclusion argues that although international trials may be necessary in certain cases, such tribunals should be based in the local jurisdiction and must remain sensitive to the needs and desires of the local population.

Diagnosis: The Deficits of International Tribunals

International lawyers working within the legalist paradigm, such as Antonio Cassese (1998, p. 4), the first President of the ICTY, have championed international criminal tribunals as reflecting a 'spirit of relative optimism' within the 'new global order.' Despite his support for this project, he highlights a number of difficulties. These include the excessive reliance on 'the goodwill of *states*' (1998, pp. 10-1) to arrest and deliver indicted individuals to the court, the difficulties these tribunals face in building the physical (courtrooms and detention units), legal (rules and precedents) and institutional (witness protection, investigative teams, etc.) architecture in which prosecutions can take place, and their problems establishing jurisdiction and legitimacy due to their physical distance from the events.

The issue of distance is perhaps the most obvious factor inhibiting international tribunals from 'fulfill[ing] the moral requirements of justice' (Schwan 1998, p. 489). It is true that domestic law occasionally allows prosecutions to be moved in order to insure their objectivity. However, judges are reluctant to allow such changes, as 'trials are undermined and not merely rendered more difficult the greater the distance between their venue and the location of witnesses and evidence' (Alvarez 1999, p. 403). These problems are compounded in international tribunals, which operate without the power to arrest suspects and subpoena witnesses.

Distance also has important psychological consequences. Local trials and other mechanisms transitional justice, such as TRCs, which allow victims to sit in on their proceedings, send a powerful symbolic message by putting the powerless into positions of judgment (Phelps 2004). The geography of international tribunals makes it difficult for the victims, their relatives, and the public to attend the trials in person, an important step that helps to spur recognition of the events and the victims within the local community.

This issue is particularly acute in the case of the ICTY, whose seat in The Hague is thousands of kilometers from the killing fields of the former Yugoslavia. According to Ralph Zacklin (2004, p. 544), 'The physical distance that exists between the seat of the ICTY and the Balkan countries means that the victims and their families are denied direct and immediate access to the work of the Tribunal. The outreach of the ICTY to the victim societies has evidently failed to bridge the gap in knowledge and appreciation of its work at the grass-roots level.' The remoteness of the ICTY made it appear to be designed to assuage the guilt of the international community for failing to prevent the genocide, instead of providing 'justice for the communities in whose name (and on account of whose suffering) the tribunal had been established' (Lutz and Reiger 2009a, p. 280).

Isolation was also a problem for the ICTR, whose proceedings occurred in neighboring Tanzania. The location of the court in Arusha was one of the reasons the Rwandan government voted against the Security Council resolution establishing the tribunal, despite originally pushing for its creation. In light of the problems resulting from distance, 'it should hardly be a surprise if most survivors of the Rwanda genocide, and not merely Rwandan government officials, prefer local trials' (Alvarez 1999, 403).

Language also presents important obstacles, since judicial procedures ‘speak only in the largely inaccessible language of legal judgment’ (Orentlicher 2007, p. 16). Beyond the incomprehensibility of legal jargon, the judicial process also affects what witnesses can and cannot say. Unlike other mechanisms of transitional justice, which allow for the use of informal language and unrestrained testimony, the strict rules governing the conduct of legal trials offer the community a severely circumscribed record of events.

These issues are magnified in international tribunals, where simultaneous translation is necessary for judges, lawyers and witnesses to interact. In the case of the ICTR, the proceedings slowed to a crawl as every exchange was mediated by one ‘overworked translator’ (Darehshori 1998, A25). The need for translation also benefits educated elites – most often the accused sitting at the dock – because they are able to follow the proceedings in the original language. By inhibiting access and participation, international tribunals operating in a foreign language undermine the ‘goal of building relationships among many different subgroups within the community’ (Alvarez 1999, p. 403).

Focusing on international tribunals as the primary location for criminal justice in transitional contexts also skews the subjects who are selected for prosecution. Given their high profile and cost, such forums have traditionally targeted ‘higher ups,’ arguing that scare resources ought to be devoted to the political leaders who bear the greatest responsibility for the atrocities committed. In the words of Cassese (1996, p. 241), ‘The impartiality of an international tribunal, the solemnity of its proceedings and its appreciation that it is above political pressures, all ensure that it is equal to the task of judging those individuals.’

Prosecuting political leaders internationally may indeed be easier than in the local community. However, the decision to reserve the international tribunal for the elites who ordered mass killings is a moral decision, not simply one of technical expedience. In selectively focusing only on elite decision-makers, while letting lower level perpetrators walk free, the international community risks sending the signal that whoever is not indicted by the ICTY or ICTR is innocent (Ackerman 1992, pp. 70ff).

By setting narrow boundaries in their choice of who to prosecute, international tribunals end up symbolically absolving many perpetrators by confining explicit responsibility for atrocities to the upper echelon of the *ancien régime*. In practice, prosecuting leaders like often Miloševič and Kambanda does little to further justice in the eyes of those who suffered at their hands. Juan Méndez (1998) shows that most victims care more about 'individualized' justice that acknowledges what happened to them and their loved ones. By focusing on the chain of command and organization of the killings, international proceedings do not provide affected individuals with information they care about most, i.e. where mass graves are located or who was involved in the killings (Chakravarti 2008, p. 225).

Reserving the most high profile cases for the international criminal justice system also undermines local institutions. While tribunals help institutionalize the global accountability norm, they do little to ensure the safety and security of traumatized victims. These problems are particularly prevalent in Rwanda, where 'international interests relating to trials competed directly with domestic interests' (Lutz and Reiger 2009b, p. 21). In the end, 'The Rwandan people have a greater interest and stake in

empowering their own local courts and other institutions than in protecting the credibility of the Security Council' (Alvarez 1999, p. 403).

Reflecting on the relationship between the domestic and international courts highlights the challenges of coordinating different legal systems that have no established procedure for resolving disagreements over resources and jurisdiction. Although the Rwandan government ultimately opposed the creation of the ICTR, it had initially asked the international community for assistance in prosecuting its *génocidaires*. The situation in Serbia was different, as even the leader of the opposition, Vojislav Koštunica, opposed Milošević's extradition to The Hague. Even more shockingly, the initial indictment of Milošević in 1999 did not address the atrocities against individuals or ethnic communities in Croatia or Bosnia. Instead, it focused solely on crimes committed by the Yugoslavian army and police in Kosovo, which was formally part of Serbia at the time (Boarov 2001). Although the decision to prosecute Milošević for crimes committed by organizations he directly controlled as commander-in-chief may be legally sound, it undermined the ICTY's standing among his victims.

Although most Serbs opposed international efforts to extradite Milošević, there was considerable support for prosecuting the former president domestically (Boarov 2001). Despite the deficiencies of Serbia's judicial system, Emir Suljagić (2009, p. 182) contends that 'it is likely that Milošević would have been found guilty of abuse of power if he had been tried in Belgrade. In an atmosphere in which he was seen by many in Serbia as the reason for the misery that had befallen them, a domestic trial would have made him a perfect scapegoat for the woes of the country.' Unfortunately, by the time he was indicted in Serbia in 2003, Milošević had already been turned over to The Hague in

exchange for international economic considerations. Instead of destroying his political legacy and bolstering the legitimacy of the Serbian judiciary, the international tribunal turned Milošević into a national hero and martyr.

The nature of the legal regime can also generate problems for international tribunals. In contrast to domestic judiciaries, which operate based on a holistic legal architecture, international courts lack established codes of criminal procedure. These tribunals have to create the rules as they go along, often mixing aspects of the adversarial system of the Anglo-Saxon world with the continental tradition of inquisitorial justice (Cockayne 2005, p. 466). The *ad hoc* procedures adopted by international tribunals are often fairly lax, allowing defendants to hijack the proceedings (Lutz and Reiger 2009a, pp. 282-3).

This problem is highlighted in the example of the right to self-representation. In February 2002 Richard May of the ICTY set an international precedent by ruling that Milošević could represent himself. He argued that although 'the defendant has a right to council…he also has a right not to have council' (International Criminal Tribunal for the Former Yugoslavia 2001, p. 18). While allowing defendants to serve as council in their own defense is part of common law, this decision confused many observers, because self-representation is not included in the practice of Roman law. This indulgence allowed Milošević to make political speeches throughout the trial, instead of only when he took the stand, as is the case for most defendants.

Milošević took full advantage of this opportunity, using each stage of the trial to address his domestic audience with presentations highlighting the devastation brought about by the international bombing campaign of 1999. By representing himself,

Milošević could sit alone at the dock, reinforcing his image as solitary patriot standing up to the oppression of the international community. It also allowed him to undermine the legitimacy and solemnity of the proceedings by 'treat[ing] witnesses, prosecutors, and judges in a manner that would earn ordinary defense council a citation or incarceration for contempt of court' (Scharf 2005, pp. 513-4). A good speaker with a flair for the dramatic, Milošević soon succeeded 'in making many impartial observers lose respect for the proceedings' (Rieff 2006, p. 14).

The issue of punishment poses another set of problems. As Mark Drumbl (2007, p. 5) points out, the international community's views on this issue have sought to resolve two contradictory imperatives. On the one hand, international lawyers have sought to establish that international criminal law has the capacity to judge and punish the perpetrators of 'extreme evil.' On the other, in their attempt to integrate international criminal law into the standard penitentiary model of ordinary criminal law model, they have also moved towards the *de facto* abolition of capital punishment. As a result, 'The enemy of humankind is punished no differently than a car thief, armed robber, or felony murderer.' While the humanitarian desire to eliminate the death penalty is noble, it can seem quaint to communities that have experienced mass atrocities. This is especially true when these communities have no say in determining the possible scope of punishment, but instead have to accept the forms of punishment acceptable to Western legalist paradigm of international law.

These issues came to the fore in Rwanda, whose domestic laws ensure that 'category one' perpetrators could not escape the death penalty (Cahn 1998, A3). Many Rwandans interpreted the Security Council's *ex ante* rejection capital punishment as a

sign of disrespect for local desires. This is yet another demonstration of the fact that 'international tribunals are accountable to, and respond most readily to, international lawyers' jurisprudential…agendas and only incidentally to the needs of victims of mass atrocity' (Alvarez 1999, p. 410). Drumbl (2007, pp. 14, 18, 16) argues that international tribunals risk a "democratic deficit by excluding local values" and by ignoring "bottom-up approaches to procedures and sanctions." This is most obvious in the case of plea-bargaining: "The fact that plea bargains are readily available for atrocity crimes, but not available in many jurisdictions for serious ordinary crimes, weakens the purportedly enhanced retributive value of punishing atrocity crimes."

Although the ICTY and the ICTR have both completed prosecutions of high-level offenders, it is hard to see these verdicts as a success. Instead of bringing justice and promoting mutual understanding, they inhibit postwar recovery by disillusioning local populations and delegitimizing the international community. Although the ICTR engaged global actors to stabilize the situation in Rwanda 'by denying the victims participation in ICTR proceedings….[it had] no impact on national reconciliation.' Most importantly, it failed to 'create the needed link between the criminal and the victim' (Kamatali 2003, p. 132). The same conclusions apply to the ICTY, which managed to quickly lose all its legitimacy in the eyes of both the Serbian and Croatian populations. Even the Bosnian Muslim community, which initially viewed the tribunal as a beacon of hope, came to see it as a 'confusing source of legal judgements and decisions that appear to have little relevance to the[ir] actual experiences, perceptions, and feelings' (Saxon 2005, p. 564).

The establishment of the ICC as a permanent tribunal has sought to address the issues raised by the ICTY and ICTR. For example, it has minimized some of the

language problems by providing a greater number of translators. The ICC has also sought to develop permanent legal procedures that resolve some of the discrepancies between common and continental law and the confusion that results. While I applaud these efforts, they do not go far enough in tackling the social and political problems inherent within the international legalist paradigm. For example, adding more translators does not address the fact operating in a foreign language undermines social reconciliation, nor does it solve the problem of what the legal forum allows witnesses to say in the first place. After all, 'A vigorous cross-examination leads even the most reliable witness to a state of confusion' (Koskenniemi 2002, p. 33).

Similarly, establishing common judicial procedures to reconcile the differences between common and Roman law does not address the fact that these practices remain rooted in Western legalism, which 'locate[s] the individual as the central unit of analysis' (Fletcher 2005, p. 1031). The cultural specificity of international criminal law, as well as its general indifference to non-European perspectives in remains problematic given that 'the operation of international criminal tribunals largely takes place outside the West' (Drumbl 2007, p. 14). As a result, the issue of mediating between universal legal norms and local traditions, expectation and desires remains salient for the ICC, just as it was for the ICTY and ICTR. As a mechanism for stimulating renewed cooperation among members of warring ethnic groups – a measure James Meernik (2005) refers to as 'societal peace' – such applications of international criminal law are insufficient as mechanisms of historical justice.

Critical Response: Discursive Contextual Universalism

The end of the Cold War resulted in a new wave of democratization in East-Central Europe, Africa and Latin America. Although the ideological battles of the Cold War put a freeze on the nascent practice of historical justice, after 1989 the international community revived the precedents of individual accountability set at the postwar trials in Tokyo and Nuremberg (Bass 2000; Minow 2002). As a result of the new global justice norm, 'state leaders have gone from being immune to accountability for their human rights violations to becoming the subjects of highly publicized trials' (Kim 2010, p. 269).

Building on the experiences of ICTY and ICTR, I have argued that direct, top-down applications of this global norm are ineffective expressions of justice in the local context. Although these tribunals may be successful examples of international accountability, 'As mechanisms for dealing with justice in post-conflict societies, they exemplify an approach that is no longer politically or financially viable' (Zacklin 2004, p. 545). By imposing outside expectations on victims and their communities, such interventions deny 'the particularity of the peoples who are making history, and the possibility that they might have politics' (Gourevitch 1998, p. 182).

The specter of political centralization without regard for the desires of existing populations has led philosophers since Immanuel Kant to reject the idea of a world state for fear that it would turn into 'a soulless despotism, [which] after crushing the germs of goodness, will finally lapse into anarchy' (Kant 1991, p. 113). In response to the dilemmas posed by global equality and diversity, Jürgen Habermas (2001b) and Seyla Benhabib (2002) have developed a flexible multi-level cosmopolitanism that can accommodate the global imperatives of the 'postnational constellation' while remaining sensitive to local 'claims of culture.' Insodoing, they chart a middle course between

communitarians, who argue that national customs must be accommodated when they conflict with global norms, and global cosmopolitans, who defend the use of 'international courts to monitor and check political and social authority of a global order…which no political regime or association can legitimately violate' (Held 1995, p. 271). As discourse theorists, Habermas and Benhabib ground their approaches in the communicative interaction that occurs between the international community and local actors.

Although Habermas (2001b, p. 69) observes that the state's loss of 'steering capacity' means that the 'conventional model [of Westphalian sovereignty] is less and less appropriate to the current situation,' he agrees with Kant that the sources of legitimacy for a world state are still lacking. Habermas fears that scrapping the state in favor of a globalized system will leave individuals in a state of *anomie*. Without the social bonds created by politics at the community level, citizens may loose the collective power to combat the rise of the powerful forces of the global economic system. His continued belief in nation-states as reservoirs of solidarity grounds his defense of their continued importance in international affairs.

In order to establish a contextual universalism that respects the historical differences between peoples while allowing for the creation of a system powerful enough to meet international political problems, Habermas (2008, p. 445) reconceptualizes world politics in terms of a 'democratically constituted world society without a world government.' He divides governance responsibilities into different levels: global legal requirements are determined through formal international law and informal customary norms, decisions about how these obligations are to be implemented and enforcement are

carried out by existing nation-states, while regional institutions such as the European Union (EU) act as meso-level intermediaries between the local and the global. In this system, 'The practices of a decentralized, multi-level politics…can at least in some respects close the efficiency gaps that open up as the nation-state loses its autonomy' (Habermas 2001a, p. 70).

For the purposes of this argument, I set aside the role of 'continental regimes' in Habermas's system. I focus instead on how the 'postnational constellation' can mediate between global imperatives, such as the emerging justice norm, and the needs, desires and traditions of transitional communities. Habermas (2001a, p. 108) severely limits the law-making authority of the global system, arguing that it should promulgate only universal 'legal norms with an exclusively moral content.' Since the global justice norm requires only a general conception of justice under which violations of basic rights ought to be punished, it falls within the weak legislative prerogative of global politics.

Habermas (2008, p. 445) contends that this allows the international community to legitimately codify global legal regulations, while also remaining 'closely linked in the historical form of the constitutional state.' In line with his discursive understanding of democratic legitimacy, he (1996, p. 485) argues that popular procedures of will-formation must remain 'permeable to the free-floating values, issues, contributions, and arguments of a surrounding…public sphere [that] functions as a normative concept.' Given that the weak global public sphere can do little more than 'naming and shaming' (2008, p. 451) violators, the implementation of even the most basic moral obligations must remain in the hands of existing polities.

Although Habermas recognizes the normative legitimacy of universally binding regulations like the global justice norm, he (1998, p. 249) argues international law must be 'transformed into administratively utilizable power' by opinion-formation at the state level. It is only by actively appropriating and accepting global legal norms that existing communities can legitimize them. However, despite this call for local implementation, he retains a belief in importance of international institutions – such as the ICC – in promulgating global norms and ensuring compliance within states (Baxter 2011, p. 244). In this sense, he agrees with Paul Seils (2016, p. 108) that the threat of prosecution by the ICC helps to ensure the effectiveness of domestic legal institutions.

Habermas may well be right on this point. However, this rigid understanding of complementarity, the legal principle that international courts will only initiate trials after the state in question has demonstrated its inability or unwillingness to prosecute perpetrators, has the potential to politicize disputes between the international community and local actors (Franceschet 2012). Although the primacy of national courts is written into Article 17 of the Rome Statute, the founding charter of the ICC, 'the Prosecutor's ability to challenge a state's willingness to investigate or prosecute…pit[s] the credibility of the Court against a state, whose leaders presumably will hotly deny that they are unwilling to prosecute' (Danner 2003, p. 522).

The disruptive potential of the complementarity principle has led Benhabib to modify Habermas's multilevel approach, giving it greater flexibility by opening it further to local agency. In thinking about the issue of complementarity, she (2016, pp. 112, 119, 130) contends that '[p]opular sovereignty and transnational law are not antagonistic; rather, the latter can enhance the former." Instead of conceptualizing the relationship

between these two levels as opposed to each other, she blurs the boundaries between them by calling for the international community to 'formulat[e] core *concepts* of human rights' in the form of transnational agreements, which then 'permit a variety of instantiations as concrete constitutional principles.' The result is 'a dynamic understanding of interaction between courts, civil society and social movements.' This process results in a dialogue between levels – facilitated by transnational social movements – instead of a tug-of-war between international tribunals and domestic courts.

Benhabib's (2006a, p. 20) argument builds on her understanding of cosmopolitanism as 'a philosophical project of mediations.' She (1992, pp. 158-9) is able to reconcile universal moral equality with concrete ethical diversity by distinguishing between the 'generalized' and the 'concrete' other. The former perspective recognizes the *humanity* of the other 'as a rational being entitled to the same rights and duties we would want to ascribe to ourselves.' By contrast, the latter acknowledges their *individuality* as human beings 'with a concrete history, identity, and affective-emotional constitution.' Mediating between these two viewpoints requires working at the intersection between general moral rules – such as the global justice norm – and concrete ethical conceptions of the good life, i.e. how those generalized perspectives can be applied in specific communities with their own traditions, histories, needs and desires. Although Benhabib (1992, p. 75) argues that these differences can be discursively bridged, 'The line between matters of justice and those of the good life is not given by some moral dictionary, but evolves as a result of historical and cultural struggles.'

This insight into the struggles between individuals and movements has a number of implications for international criminal law. First, it emphasizes the importance of not

reducing ‘cosmopolitanism to a bid for imperial domination’ by imposing legislation on existing ethical communities – i.e. the concrete other – without their consent (2011, p. 3). Second, the discursive struggle to mediate the moral with the ethical guards against the tendency to regard the desires of the other as monolithic. On the contrary, Benhabib (2002, p. viii) emphasizes that the aspirations of the other are also ‘constituted through contested practices.’

The normative lesson of this insight is that discursive engagement can spur the concrete other to take up universal moral norms *from the inside*. Debate within the domestic public sphere allows local communities to legitimize generalized rules without the need for external imposition. In the process of these discursive iterations, ‘cosmopolitan norms are suffused with historically specific content’ (Benhabib 2006b, p. 170). This not only mediates between moral norms and democratic self-determination, it also infuses the abstract ideals of universal rights ‘with content drawing on experiences that could not have guided those rights in their initial formulation… open[ing] up new worlds and creat[ing] new meanings’ (Benhabib 2006b, p. 159).

Benhabib’s discursive cosmopolitanism shows that it is counterproductive to enforce abstract legal principles on transitional communities that are not ready to accept them. As I have shown, such imposition can disillusion victims, causing them to view international justice as incomplete and illegitimate. Instead of leading to an internal debate about past atrocities and reaffirming the human dignity of all citizens, international prosecutions often put the focus on the workings of an institution operating far away, in a foreign language, under foreign rules front and center in domestic discourse.

In considering how to reconcile democratic rule with international claims for justice, Benhabib's approach emphasizes the importance of domestic debate about global norms. It is only through discourse at the local level that the abstract, empty expectations of the weak global public presupposed by Habermas can be filled with content. Robert Post (2006, p. 4) points out that 'Benhabib's profound insight is to conceptualize the emergence of cosmopolitan law as a dynamic process through which the principles of human rights are progressively incorporated into the positive law of democratic states.' By incorporating global principles into national criminal codes, 'the content of democratic law is progressively reconstructed along lines that reflect principles of ethical universalism.' Borrowing a term from Judith Resnik (2006), Benhabib (2007, p. 31) refers to this process as 'law's migration.'

In addition to legitimizing international criminal law at the local level, this process also fosters the development of democratic culture within transitional communities. By engaging with international law and the requirements of human rights declarations and treaties, actors within nascent democracies learn 'to enter the public sphere, to develop new vocabularies of public claim-making, and to anticipate new forms of justice to come in processes of cascading democratic iterations' (2011, p. 298). Leaving decisions about how to punish the perpetrators of state-sponsored atrocities to the local community is also more likely to lead to justice. It is only if they feel that they have had a voice in this process that victims will be satisfied with the end result. As Michael lgnatieff (1996, p. 114) points out, if transitional justice is to be a successful response to atrocity in terms of producing a truth that all sides can accept, then it 'must be authored by those who have suffered its consequences.'

Focusing on justice as a local, discursive process also fosters reconciliation between victims and perpetrators, who have to find ways to live and make decisions together in the shadow of atrocity. Reaching an understanding about what happened in the past and making their own decisions as to how to punish perpetrators are key parts of transitional justice. Although these debates are contentious, they have the potential to 'set in motion processes of mutual challenging, questioning, and learning' (Benhabib 2002, p. 35).

The discourse theoretic model adopted by both Habermas and Benhabib builds on Hans-Georg Gadamer's (2004, p. 601) notion of a 'fusion of horizons' (*Horizontverschmelzung*). Under this model the goal of interaction between Ego and Alter – the victims and perpetrators – is not assimilation, but a convergence of viewpoints where each side learns to see the world from the perspective of the other (Habermas 1983, pp. 189-98). The key insight of cosmopolitan discourse theory is that the international community should foster these debates at the local level, instead of imposing conceptions of justice on traumatized societies from the outside.

Signs of Learning: Domestically Implemented Tribunals

The conclusion that 'the enforcement of international humanitarian law cannot depend on international tribunals alone' is hardly new (Meron 1995, p. 555). On the contrary, it is clear that national justice systems have a crucial role to play in transitional justice. However, domestic courts also face many problems prosecuting gross violations of human rights, particularly in the tense, distrustful atmosphere of a democratic transition.

In addition to the dichotomous choice between international tribunals or domestic trials, the global accountability norm has also been implemented by using locally-based but internationally-backed tribunals. This was the case in both the Nuremberg Trials in postwar Germany, and the International Military Tribunal for the Far East, usually referred to as the Tokyo War Crimes Tribunal. Neil Kritz (1996, p. 131) points out, 'There is good reason why the post-World War II international prosecution of war criminals took place in Nuremberg and Tokyo…. For an international tribunal to be maximally effective, victims and perpetrators should feel that its activities are not too far removed from them.'

The prosecutions at Nuremberg and Tokyo faced many of the same problems as the ICTY and ICTR. For example, these trials also took place under international auspices, in a foreign language, using *ad hoc* rules and outside judges. They had the added problem of being imposed while Germany and Japan were under international military occupation. While this eased the problems subsequent tribunals have had in calling witnesses and locating evidence, it significantly increased the chances of these prosecutions being dismissed as 'victor's justice' (*Siegerjustiz*).

Despite these difficulties, the tribunals in Nuremberg and Tokyo are 'the most successful example' (Bass 2000, p. 5) of war crimes tribunals by almost any measure. Despite the unprecedented nature of holding state officials accountable for criminal activities that were not against the law when they were committed, three quarters of Germans reported that the trials were 'fair' and 'just' (Breyer 1996, p. 1163). This is a far cry from the widespread rejection of the prosecutions carried out at the ICTY and ICTR, which have not succeeded in establishing a widely accepted official history of events in

Rwanda or the former Yugoslavia. The ICTY even failed in its most basic task of acting as a deterrent, as the July 1995 massacres at Srebrenica occurred after the tribunal was established in May 1993.

In addition to avoiding the accusations of partiality that have plagued subsequent tribunals, the postwar prosecutions at Tokyo and Nuremberg were also better able to 'contribute to the process of national reconciliation and to the restoration and maintenance of peace' (United Nations Security Council 1994, Preamble) – the stated goal of the Rwanda tribunal – than the trials held in the courtrooms of the ICTY and ICTR. In large part, this success is due to the fact that these tribunals were one part of the larger process of historical justice. Koskenniemi (2002, p. 6) points out that 'criminal justice has not been at the forefront of *Vergangenheitsbewältigung* [the struggle to overcome the past]' in these cases. On the contrary, the trials were one part of a broader, societal process of reconciliation. As a result, the Federal Republic and Japan are two of the most stable and consolidated democracies in the world today. Although Japan has not adequately atoned and apologized for its crimes against the Chinese and Koreans, it does not question the decisions of the Tokyo Tribunal (Berger 1998, p. 256).

Reflecting on the development of policies towards human rights abusers, Pablo De Greiff (1998, p. 79) observes that 'after a period during the eighties in which pardon and oblivion replaced trial and punishment by an international court such as the tribunal at Nuremberg, we seem to be back to the Nuremberg model as a paradigm for the treatment of human rights criminals.' Unfortunately, in returning to this model the international community has forgotten that the primary audience of these trials is local. For Kritz (1996, p. 131), 'It is axiomatic that the weaker the connection between the

international operation and the local population, the easier it will be for its work to be ignored or dismissed as an alien effort irrelevant to concerns in the country.' This lesson was not applied to the ICTY and ICTR, nor is it clear that the situation with the ICC is any better in this regard.

Despite these problems, there is still hope for international criminal justice. Many of the tribunals created since 2000, including the Serious Crimes Panel for East Timor, the Special Court for Sierra Leone, the Indonesian Human Rights Court and the Extraordinary Chambers in the Courts of Cambodia, have moved towards a mixed or hybrid model involving both domestic and international components. Although these tribunals have their own difficulties, they have taken the needs, traditions and desires of their local communities into account to a far greater degree than either the ICTY or the ICTR (Cohen 2002, pp. 1-8).

The persistent problems of international prosecutions lead Steven Roper and Lilian Barria (2005, 534) to argue that on the 'issue of reconciliation and the establishment of a historical record of abuses, perhaps no tribunal model is totally effective.' This sentiment is echoed by John Shattuck (in Bass 2000, p. 222), who notes, 'Justice doesn't have to ultimately mean putting people behind bars.' On the contrary, in line with my understanding of the new 'global justice norm' as an anti-impunity norm, 'Success is a commitment to establish the principles of accountability, getting out the truth.'

A 2004 report from the UN Secretary General (2004) argues that 'strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived

combination thereof.' In theorizing transitional justice, De Greiff (2012, p. 32) has sought to produce a philosophical justification of 'why the selective application of transitional justice measures is misguided.' While a full account of De Greiff's conclusions lies beyond the scope of my argument here, what is clear is that on its own the foreign-based model of the international *ad hoc* tribunal is inadequate as a response to the global justice norm.

Conclusion

Drawing on my diagnosis of the shortcomings of the ICTY and ICTR, I have argued against the use of international tribunals to implement the emerging global justice norm directly. Because they are geographically, linguistically, and legally removed from the victims international trials are inadequate vehicles for justice. Reflecting on the ICTY and ICTR, it is hard to dispute Ralph Zacklin's (2004, p. 542) conclusion that these tribunals 'were established more as acts of political contrition, because of egregious failures [of the international community] to swiftly confront the situations in the former Yugoslavia and Rwanda, than as part of a deliberate policy, promoting international justice.'

Let me be clear: this critique of international tribunals is *not* an indictment of the ideal of transitional justice or of international criminal law. Furthermore, my approach does not shift the focus away from justice towards a 'realist' focus on expediency; on the contrary, after centuries of impunity the rise of the global justice norm is a welcome development. Despite the problems facing international criminal law, it is clear that 'the treatment by states of citizens and residents within their boundaries is no longer an unchecked prerogative. One of the cornerstone's of sovereignty, namely that states enjoy

ultimate authority over all objects and subjects within their circumscribed territory, has been delegitimized through international law' (Benhabib 2006a, p. 31).

Building on the multi-leveled international discourse theories of Habermas and Benhabib, I have argued that the implementation of the global justice norm 'must take place above all at the local level, the village or township, in order to take root' (Roht-Arriaza 1998, p. 279). Allowing traumatized individuals within transitional societies to debate and collectively determine how to implement transitional justice makes this part of a political process of problem solving that helps to bolster communal decision-making. It also allows international legal norms to become part of 'the expression of local values and preferences as well as traditions of self-rule, autonomy, and continuous political contestation' (Koskenniemi 2011, p. 68).

My argument about the importance of the local context in the implantation of transitional justice is not meant to overlook the problems of relying on weak or badly damaged local institutions in postconflict settings. In certain cases, it may indeed be necessary for international authorities to assist in or even oversee the implementation of transitional justice. However, in doing so, the international community must not forget that, in Judith Shklar's (1964, p. 81) words, 'The voices of the victims must always be heard first, not only to find out whether officially recognized social expectations have been denied but also to attend to their interpretations of the situation.' The implementation of the new global justice norm must serve the victims and the social rehabilitation of local communities, not the guilt or desires of the international community.

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